APPENDIX

1

STANLEY KALASUNAS, ET AL.,
Plaintiffs

vs.

CHARLES BRYDLE, ET AL.,
Defendants

IN THE COURT OF COMMON PLEAS

ASHTABULA COUNTY, OHIO

CASE NO. 69447

JUDGMENT

Filed September 4, 1980

This action came on for trial before the Court and a jury and the issues having been duly tried and the jury having rendered its verdict,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiffs, Stanley Kalasunas and Gloria Kalasunas, be and the same are hereby awarded judgment against defendants, Madison Realty, Inc. and Hilltop Realty, Inc., joint and

severally, in the amount of Five Thousand Dollars ($5,000.00).

It is further ordered, adjudged, and decreed that the plaintiffs, Stanley Kalasunas and Gloria Kalasunas, be and the same are hereby awarded recission of the contract to purchase property located at 611 East 260th Street, Euclid, Ohio, against the defendants, Charles Brydle and Joann Brydle. In addition, said plaintiffs are awarded judgment against the defendants, Charles Brydle and Joann Brydle in the sum of Forty-eight Thousand Dollars ($48,000.00) plus interest at six (6) per cent from October 28, 1978.

It is further ordered that upon satisfaction of their judgment, the plaintiffs, Stanley Kalasunas and Gloria Kalasunas, are ordered to transfer title to said real estate to the defendants, Charles Brydle and Joann Brydle.

It is further ordered that the costs of this action be assessed one-third a-

gainst the defendants, Charles Brydle and Joann Brydle, one-third against the defendant, Madison Realty, Inc., and one-third against the defendant, Hilltop Realty, Inc.

/s/Ronald W. Vettel
RONALD W. VETTEL, JUDGE

September 3, 1980

cc: R. Oviatt
R. Buss
G. Galan
P. Caticchio

APPENDIX

2

In Re: CHARLES D. BRYDLE & JOANN BRYDLE
Debtors

STANLEY KALASUNAS, et al.,
Plaintiffs

vs.

CHARLES D. BRYDLE, et al.,
Defendants

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. B81-00004-Y

Adversary Proc. No. B81-0034Y

Bankruptcy Judge Molitoris

JUDGMENT ENTRY

FILED JUNE 1, 1981

BEFORE HONORABLE MARK SCHLACHET,
BANKRUPTCY JUDGE:

At Cleveland, in said District, this ____day of_____, 1981.

This cause came on to be heard by the Court upon the Motion of the Plaintiff for Summary Judgment, the Complaint

of the Plaintiffs, Answer of Defendants, Stipulations and the Briefs and oral arguments of counsel.

Upon consideration thereof, THE COURT FINDS, pursuant to BR 756 and Rule 56 of the Federal Rules of Civil Procedure, that there is no genuine issue as to any material fact and that the Plaintiffs are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' Motion for Summary Judgment be and the same is hereby granted.

2. Plaintiffs' claim against Defendants is deemed to be nondischargeable under 11 U.S.C. §523(a)(2), as a debt arising out of obtaining money, property or services by false pretenses, false representations or actual fraud.

3. The Plaintiffs are granted relief from the stay provisions of 11 U.S.C. §362 and are free to proceed in the state courts to enforce the judgment

heretofore entered in their favor by the Common Pleas Court of Ashtabula County, Ohio, in Case No. 69447, entitled "Stanley Kalasunas, et al., v. Charles Brydle, et al.", including, without limitation, the right to seek post-judgment modification of the state court judgment, proceedings in aid of execution or such other steps necessary to obtain satisfaction of their claim against Defendants-Debtors.

/s/Mark Schlachet
BANKRUPTCY JUDGE

APPROVED:

/s/Harvey S. Morrison
HARVEY S. MORRISON
and

/s/Richard A. Oviatt
RICHARD A. OVIATT
Attorneys for Plaintiffs

/s/Ralph C. Buss as to form
RALPH C. BUSS,
Attorney for Defendants

APPENDIX

3

IN RE: CHARLES D. BRYDLE, JOANN BRYDLE
Bankrupt

STANLEY KALASUNAS, et al.,
Plaintiffs-Appellees,

v.

CHARLES D. BRYDLE, et al.,
Defendants-Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C81-1428Y

Adversary Proc. No. B81-0034Y
Bankruptcy No. B81-00004Y

JUDGE JOHN M. MANOS

MEMORANDUM OF OPINION

On or about September 1, 1978 appellees, Stanley and Gloria Kalasunas, entered into a contract with the appellants, Charles and Joann Brydle, for the purchase of residential property located in Euclid, Ohio. On October 28, 1978 title to the home was transferred. Subsequent to

October 28, 1978 the Kalasunases discovered certain defects in the house including but not limited to: (1) a cracked foundation wall; (2) a lack of proper insulation in the attic; (3) no garage wiring; (4) a disconnected wet bar; and (5) a disconnected electric pump which, when operational, was used in a pond located behind the house.[1] Consequently, on December 11, 1978 the Kalasunases filed an action in the Ashtabula, Ohio Court of Common Pleas against the Brydles, as well as Hilltop Realty, Inc., and Madison Realty, Inc., alleging that they had been fraudulently induced into entering the contract and they were entitled to recission and compensatory and punitive damages. On September 2, 1980 a jury trial resulted in a verdict in favor of the Kalasunases against all defendants. On September 18, 1980 the Brydles moved

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1 Transcript of Bankruptcy Proceedings, pp. 7 and 8.

for a new trial on the ground that the trial court erred in submitting the equitable issue of recission to the jury. The trial court denied this motion holding that it had only submitted the factual issues underlying the Kalasunas' claim for recission to the jury, that the jury found that the Kalasunases had been fraudulently induced by the Brydles into entering the contract, and that the court had adopted the jury findings by awarding a judgment of recission to the Kalasunases.[2] In its decision holding that the jury verdict on the equitable claim was only advisory in nature the trial court did make certain findings of fact. First, the court found that the property being sold had been shown to the Kalasunases with the knowledge and consent of the Brydles and that at that time there existed electrical wiring in the garage and to the pump at the pond, full insulation in the attic and an operable sink

2 Transcript of Bankruptcy Proceedings, Exhibit D-2, p.2.

On January 1, 1981 the Brydles filed a joint petition for voluntary bankruptcy listing the Kalasunases as creditors. On February 23, 1981 the Kalasunases filed an adversary complaint alleging that the judgment of recission awarded to them by the Ashtabula, Ohio Court of Common Pleas remained unsatisfied and was a nondischargeable debt pursuant to 11 U.S.C. §523(a)(2)(A).[4] On June 1, 1981 the

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4 11 U.S.C. §523(a)(2)(A) provides as follows:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt -
>
> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by -
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

bankruptcy court granted the Kalasunas' motion for summary judgment[5] holding that since it was collaterally estopped by the state court's decision from examining the underlying merits of the fraud issue, the judgment awarded against the Brydles was a nondischargeable debt pursuant to the statute cited above. On June 1, 1981 the Brydles filed a notice of appeal to this court. For the reasons which follow this court affirms the decision of the bankruptcy judge.

The Brydles contend that since a finding of intentional or, willful or, malicious wrongdoing and/or a finding of moral turpitude is necessary before 11 U.S.C. §523(a)(2)(A) may be invoked to render a debt nondischargeable in bankruptcy and since the state court made no such finding, the bankruptcy judge erred in holding that the doctrine of collateral estoppel applied to bar

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5 Fed. R. Bkr. P. 756 provides as follows:

Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings.

relitigation of the fraud issue. Although the Brydle's contention has merit this court holds that the element of intent can be inferred from the facts of record in the instant case and, therefore, affirms the decision of the bankruptcy court.

11 U.S.C. §523(a)(2)(A) operates to bar the discharge of debts which were obtained by the bankrupt through false pretenses, false representations or actual fraud.[6] For the statute to bar discharge on the ground of false pretenses or representations it must be affirmatively shown that the bankrupt either had actual knowledge of the falsity of a statement or, a reckless disregard for its truth. In re Pedrazzini, 644 F.2d 256 (9th Cir. 1981). To bar discharge on the ground of fraud, the statute is satisfied only when an actual intent to deceive is proved. Commonwealth of Massachusetts v. Hale, 608 F.2d 143 (1st Cir. 1980). In other words, the fraud required to

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6 See: F.N. 4.

prove nondischargeability is actual or positive fraud, not fraud implied at law or constructive fraud. In re Blessing, 442 F.Supp. 68 (S.D.Ind. 1977). Proof of such fraud requires proof of either an intentional wrong or moral turpitude. Sanitation Recycling, Inc. v. Jay Peak Lodging Ass'n.Inc., 428 F Supp. 1022 (D. Vt. 1977). Thus, the issue of whether the bankruptcy court erred in holding that the Brydles were collaterally estopped from relitigating the underlying elements of the fraud issue is resolved by determining if the state court, in awarding the Kalasunases a judgment of recission, of necessity had to determine that the Brydles possessed an actual intent to deceive. The issue presented by the instant case is resolved in this manner because the doctrine of collateral estoppel operates to bar relitigation of factual issues in a bankruptcy court if a state court has previously determined those issues in the course of adjudicating a state law question. Brown v.

Felsen, 442 U.S. 127, 99 S. Ct. 2205 (1979); Montana v. United States, 440 U.S. 147, 99 S. Ct. 970 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645 (1979).

Under Ohio law the elements of actionable fraud include: (1) a false representation, whether actual or implied, or the concealment of a fact material to the transaction; (2) knowledge of the falsification of the statement or utter disregard for the truth of the statement; (3) intent to mislead another into relying on the misrepresentation; (4) reliance in circumstances in which there is a right to rely; and (5) injury as a consequence of that reliance. Clayton v. McCary, 426 F. Supp. 248 (N.D. Ohio 1976); Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785 (N.D. Ohio 1974). Ohio law, however, does not require that the plaintiff in a fraud action show that the defendant knowingly made the misrepresentation upon which the plaintiff relied. Nickels v. Koehler

Management Corp., 541 F.2d 64 (6th Cir. 1976), cert. denied, 429 U.S. 1074, 97 S. Ct. 813 (1977). It is sufficient that the false representation was made recklessly and without any knowledge or information on the subject and was calculated to induce belief. Id. The Supreme Court of Ohio has held that an action for fraud and deceit is not only maintainable as a result of affirmative misrepresentations but may be maintained as a result of negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature when there exists a duty to so disclose. Miles v. McSweqin, 58 Ohio St. 2d 97, 388 N.E.2d 1367 (1979). The holdings discussed above have been interpreted by lower courts in Ohio to sustain judgments of rescission to residence purchasers on not only the ground of actual fraud but, constructive fraud as well. See: DiPippo v. Meyer, 24 Ohio App.2d 86, 263 N.E.2d 907 (Ct.App.Ham.Cty. 1970).

Although a state court judgment pre-

mised on fraud constitutes prima facie evidence of a debt which is not dischargeable in bankruptcy, In re Houtman, 568 F.2d 651 (9th Cir. 1978), for the doctrine of collateral estoppel to bar relitigation of the dischargeability issue the bankruptcy court must find that the issue sought to be precluded is the same as that involved in the prior action, that the issue was actually litigated, that it was determined by a valid and final judgment and that such determination was essential to the prior judgment. In re Ross, 602 F.2d 604 (3rd Cir. 1979). See also: Brown v. Felson, supra. Since, in the instant case, it was not necessary for the state court to find an actual intent to deceive, DiPippo v. Meyer, supra, and there is no indication in the record before this court that either the trial judge made such a finding or, that the jury did so through the use of special interrogatories or some other procedural device, the bankruptcy judge erred in holding that the Brydles

were collaterally estopped from relitigating the intent element of fraud necessary for the determination of nondischargeability pursuant to 11 U.S.C. §523(a)(2)(A). Indeed, in In re Johnson, 323 F.2d 574 (3rd Cir. 1963), a case presenting an issue similar to that in the instant case, the Third Circuit Court of Appeals held, that when a state court judgment in fraud does not on its face indicate the conduct of the fraud for which it was rendered, a bankruptcy court is required to inquire into the nature of the liability which has been reduced to judgment in order to determine if the judgment falls within an exception to the discharge provisions of the Bankruptcy Act. Although it is clear that the bankruptcy judge erroneously applied the doctrine of collateral estoppel to the facts of the instant case, for the reasons which follow it is equally clear that his decision must nonetheless be affirmed.

In ascertaining whether a judgment

has been discharged in bankruptcy a court may go behind the judgment and examine the entire record including, if necessary, the taking of extrinsic evidence. Martin v. Rosenbloom, 329 F.2d 817 (9th Cir. 1964). A review of the record in this case clearly evidences that the Brydles possessed the necessary intent for a finding that the judgment against them was a nondischargeable debt pursuant to 11 U.S.C. §523(a)(2)(A).

The scienter requirement of 11 U.S.C. §523(a)(2)(A) is satisfied if the facts indicate that the bankrupt recklessly disregarded the truth. In re Houtman, 568 F.2d 651 (9th Cir. 1978). For the purposes of determining whether a debt is nondischargeable on the ground that the bankrupt obtained money or property through representations known to be false or made with a reckless disregard for the truth, if the bankrupt knowingly or recklessly makes a false representation which he knows or should know will induce a lender, creditor, or, as in the instant

case, a purchaser, to part with money or property, intent to deceive may be logically inferred. Carini v. Matera, 592 F.2d 378 (7th Cir. 1979); In re Nelson, 561 F.2d 1342 (9th Cir. 1977); In re Garman, 625 F.2d 755 (7th Cir. 1980), cert. denied, __U.S.__, 101 S.Ct. 1347 (1981). See also: In re Garman, 643 F.2d 1252 (7th Cir. 1980). As noted above, in the instant case, after the Kalasunases had viewed the home and entered into a contract of purchase, Brydle, in order to comply with housing ordinances of the City of Euclid, Ohio, removed all wiring from the garage which of necessity also disconnected the electric pump at the pond behind the house, removed all insulation from the attic and disconnected the drainpipe and removed the handles from the sink at the wetbar rendering it inoperable. The Kalasunases were never advised of these charges even though the Brydles had a duty to disclose them. This court holds that even if the Brydles did not willfully intend to deceive the

Kalasunases a reckless disregard for the truth amounting to a willful misrepresentation may be inferred from their conduct of effecting the changes to the house without disclosing them to the Kalasunases and, therefore, the bankruptcy court's grant of summary judgment on the ground that there existed no genuine issue of material fact regarding the issue of whether the Kalasunas' state court judgment was a nondischargeable debt pursuant to 11 U.S.C. §523(a)(2)(A) must be, and is, affirmed. In re Houtman, 568 F.2d 651 (9th Cir. 1978); Carini v. Matera, supra; In re Garman, supra. See also: Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. denied, 444 U.S. 996, 100 S. Ct. 495 (1979); Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir. 1974); Daily Press Inc. v. United Press Int'l., 412 F.2d 126 (6th Cir.), cert. denied, 396 U.S. 990, 90 S.Ct. 480 (1969).

Accordingly, the bankruptcy court's decision of granting summary to the appellees is affirmed.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

FILED AUGUST 27, 1981

APPENDIX

4

IN RE: CHARLES D. BRYDLE, JOANN BRYDLE,
Bankrupts.

CHARLES D. BRYDLE and JOANN BRYDLE,
Defendants-Appellants,
v.

STANLEY KALASUNAS and GLORIA KALASUNAS,
Plaintiffs-Appellees.

NO. 81-3580
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED NOVEMBER 3, 1982

O R D E R

BEFORE: ENGEL and JONES, Circuit Judges, and NEESE, District Judge.*

Defendants-appellants Charles and JoAnn Brydle appeal from the decision of the district court which held that a debt owed to plaintiffs-appellees Stanley and Gloria Kalasunas, and evidenced by a state court judgment, is not dischargeable

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* The Honorable C.G.Neese, District Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

pursuant to the terms of 11 U.S.C. §523(a)(2)(A). [1] For the reasons stated below, we affirm.

On or about September 1, 1978, the Kalasunases entered into a contract with the Brydles for the purchase of the latter's home. Title was subsequently transferred. However before the Kalasunases took possession of the premises, they discovered certain defects in the house. On December 11, 1978, after these defects had not been corrected, the Kalasunases filed an action in the Ohio Court of Common Pleas against the Brydles and others alleging that they had been fraudently induced into entering the contract as well as punitive damages.

A jury trial resulted in a verdict in favor of the Kalasunases. Thereafter, the Brydles moved for a new trial on the ground that the trial court erred in submitting the equitable issue of recission to the jury. The state trial court denied the motion and held that it had only submitted the factual issues

cluded in the sale was no longer true.

6. Since Brydle admitted that he engaged in the conduct which effected the changes the Kalasunases were entitled to recission on the ground that they had proved fraudulent inducement by clear and convincing evidence.

On January 1, 1981, the Brydles filed a joint petition for voluntary bankruptcy listing the Kalasunases as creditors. Subsequently, the Kalasunases filed an adversary complaint alleging that the judgment awarded by the Ohio court remained unsatisfied and was a nondischargeable debt pursuant to the terms of 11 U.S.C. §523(a)(2)(A). On June 1, 1981, the bankruptcy court granted the Kalasunases' motion for summary judgment holding that it had no option but to find that the judgment awarded was a nondischargeable debt, since it was collaterally estopped by the state court's decision from examining the underlying merits of the fraud issue.

On appeal, the district court found that the bankruptcy court had erred by

applying the doctrine of collateral estoppel. However, the court found that the elements necessary to find the debt nondischargeable could be clearly established from the facts of the record. It therefore affirmed the decision of the bankruptcy court.

On appeal before this Court, the Brydles now contend that the district court erred by not remanding the case and directing the bankruptcy court to admit and consider extrinsic evidence, especially the testimony of the parties, in determining whether the debt was dischargeable. They also assert that the factual findings of the Ohio state court do not provide a sufficient basis upon which to find the debt non-dischargeable. We disagree.

Section 523(a)(2)(A) of the Bankruptcy Act vests exclusive jurisdiction in the bankruptcy court to determine whether a debt is dischargeable. In determining this question, a bankruptcy court is not confined to a review of the

judgment and record; rather, a court may admit and consider extrinsic evidence, when necessary, in order to determine the nature of the debt underlying the judgment. See Brown v. Felsen, 442 U.S. 127, 138-39, 1979; Matter of Pigge, 539 R.2d 369, 371 (4th Cir. 1976); see also In re Johnson, 323 F.2d 574, 578 (3d Cir. 1963). However, the admission of this extrinsic evidence is discretionary. A court is not precluded from looking at the state court record so long as it considers all relevant evidence in making its determination of dischargeability. See In re Houtman, 568 F.2d 651, 653 (9th Cir. 1978).

In the instant case, contary to the suggestion of the Brydles, it was not necessary to admit other evidence. The state court record contained findings of facts which were clearly relevant to the question of nondischargeability. It was not error for the district court to consider this as evidence upon review of the bankruptcy court's grant of summary judgment. The error lies in the Brydles'

failure to come forth, when opposing the summary judgment motion, with evidence to demonstrate the existence of a material issue of fact. See Casey Lumber v. Bell, 615 F.2d 370, 377-78 (5th Cir. 1980). Under such circumstances, the district court was correct in accepting these recitations of fact as true and finding that they required the legal conclusion that the debt owed was nondischargeable. Id.; see Furman v. Lazarus, 361 F.Supp. 477, 488 (E.D. Pa. 1973), aff'd, 493 F.2d 1400 (3rd Cir. 1974); see also Carini v. Matera, 592 F.2d 378, 380 (7th Cir. 1979).

Accordingly, the judgment of the district court is AFFIRMED.

Judge Neese dissents.

ENTERED BY ORDER OF COURT

_____

Clerk

ISSUED AS MANDATE: November 26, 1982

Footnote

1/ 11 U.S.C. §523(a)(2)(A) provides in pertinent part:

> A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (2) for obtaining money, property, services or an extension, renewal or refinance of credit by --
>
> (A) false pretenses, a false representation, or actual fraud ...

APPENDIX
5

IN RE: CHARLES D. BRYDLE, JOANN BRYDLE,
Bankrupts.

CHARLES D. BRYDLE and JOANN BRYDLE,
Defendants-appellants,

v.

STANLEY KALASUNAS and GLORIA KALASUNAS,
Plaintiffs-appellees.

NO. 81-3580
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
FILED DECEMBER 13, 1982

NEESE, District Judge, dissenting. I am in full accord with the statements of the majority as to the controlling law; had the District Court affirmed on the first appeal herein on the basis of the appellants' failure to come forth in opposition to the appellees' motion for summary judgment with evidence to demonstrate the existence of a material fact, I could concur. Such, however, is not the situation, and I dissent respectfully.

The Bankruptcy Court was considering, in the adversary proceeding between the

litigating parties, whether the appellants were discharged as individual debtors from their debt to the appellees because they had obtained from the latter money, property, services or an extension, renewal or refinance of credit by "false pretenses, a false representation, or actual fraud..." 11 U.S.C. § 523(a)(2)(A). It concluded such debt was nondischargeable because of a finding of a jury in a state court action that the appellants had practiced a fraudulent inducement upon the appellees, and that the appellees were entitled to a recission of the instrument of conveyance of the parties. In so doing, the Bankruptcy Court concluded also that it could not do otherwise because it was collaterally estopped by the judgment in the state court from receiving and considering extrinsic evidence.

As the District Court concluded on the first appeal herein, this was error on the part of the Bankruptcy Court. Under the authorities cited by the majority, I agree this was error; at the same time, I cannot agree that the Bankruptcy Court

considered all the relevant evidence in making its determination of nondischargeability. See In re Houtman, 568 F.2d 651, 653 (9th Cir. 1978). The Bankruptcy Court was concerned with false representation or actual fraud by the appellants, 11 U.S.C. §§ 523(a)(2)(A), supra; the state Court had been concerned with whether there was clear and convincing evidence before its jury that the appellants "knowingly made the misrepresentation upon which the (appellees) relied," Nickels v. Koehler Management Corp., 541 F.2d 611, 617 (6th Cir. 1976), cert.den. 429 U.S. 1074 (1977). These two indicia of fraud are not one and the same, and the evidence requisite to support each is not identical.

"Actual fraud" within the meaning of 11 U.S.C. §523(a)(2)(A), supra, "meant positive fraud, or fraud in fact (emphasis added by this writer), involving moral turpitude or intentional wrong, which might exist without the imputation of bad faith or immorality." Upshur v. Briscoe, 138 U.S. 365, 476 (1890), citing Neal v. Clark, 95 U.S. 704, 706 (1877).

"Ohio law . . . does not require that the plaintiff in a fraud action show that the defendant knowingly made the misrepresentation upon which the plaintiff relied." Nickels v. Koehler Management Corp., supra.

Furthermore, "cases involving questions of motive or intent are normally not suited to disposition on summary judgment, "Smith v. Hudson, 600 F.2d 60, 66 (6th Cir. 1979), cert.dismd. 444 U.S. 986 (1979), as the Bankruptcy Judge did here. Because of the differing testimony of the parties, the issue of whether the appellants had committed actual fraud against the appellees "could not be resolved without the benefit of a hearing," In re Metropolitan Intern., Inc., 616 F.2d 83, 86-87 (3d Cir. 1980), and the reception and consideration by the Bankruptcy Court of extrinsic evidence therein.

A trial judge should be slow indeed to dispose of a case summarily "where questions of motivation or fraud may be at issue and parties should normally be allowed to develop their cases by witnesses at trial." Williamson v. Wilbur

Rogers, Inc., 381 F.2d 719, 721 (6th Cir. 1967). This is a guide for disposing of issues under Rule 56, F.R.Civ.P. "Rule 56 of the Federal Rules of Civil Procedure applies to adversary proceedings" in Bankruptcy Court. Rules Bankr.Proc. Rule 756, 11 U.S.C.; see In re Proof of Pudding, Inc., 10 B.R. 459 (Bkrptcy.N.Y. 1981).

After concluding that the Bankruptcy Court had applied an erroneous standard in deciding the motion for a summary judgment, on appeal the District Court affirmed, upon its own finding from the judgment of the state court the clear establishment therein of the elements necessary to find the debt to the appellees nondischargeable; the District Court "inferred" from the conduct of the appellants "a reckless disregard for the truth amounting to a willful misrepresentation" in the findings of the state court. I submit this was an improper manner in which to make summary disposition of the first appeal herein.

"It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless

disagree about the inferences to be drawn from these facts, what intention of the parties was shown by the facts. . . . Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment." S. J. Groves & Sons Company v. Ohio Turnpike Commission, 315 F.2d 235, 237-238 (6th Cir. 1963), quoted with approval in Arnold Palmer Golf Co. v. Fuqua Industries, Inc., 541 F.2d 584, 588 (6th Cir. 1976). That appears to be precisely the situation herein.

Actual fraud in-fact could not have been presumed by the District Court; "one who bases a right or defense upon it should allege and prove it." United States v. Colorado Anthracite Co., 225 U.S. 219, 226 (1912). Neither false representation nor actual fraud had been litigated before the Bankruptcy Court except to the extent of its interpretation of jury-findings in the state Court, and, for the same reasons which restricted the Bankruptcy Court in granting summary judgment, the District Court was not per-

mitted to dispose of the first appeal herein summarily.

In my view, the proper procedure on the first appeal would have been for the District Court to have reversed the Bankruptcy Court and remanded these proceedings to it for a trial on the false representation and actual fraud issues upon all of the evidence, extrinsic to as well as in the record. Under this view, I would now reverse the District Court and remand these proceedings to it with a direction to remand them to the Bankruptcy Court for trial of those issues.

-0-

APPENDIX

6

11 U.S.C.

§523. Exceptions to discharge

(a)A discharge under section 727, 1141, or 1328(b) of this title (11 USCS §724, 1141, or 1328(b)) does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A)of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title (11 USCS §507(a)(2) or (a)(6)), whether or not a claim for such tax was filed or allowed;

(B)with respect to which a return, if required--

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C)with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
or
(B) use of a statement in writing--
(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and
(iv) that the debtor caused to be made or published with intent to deceive;

Office-Supreme Court, U.S.
FILED
MAR 1983
ALEXANDER L. STEVAS, CLERK

NO. 82-1299

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES D. BRYDLE AND JOANN BRYDLE,

Petitioners,

-vs-

STANLEY KALASUNAS AND GLORIA KALASUNAS

Respondents.

ON WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondents

NO. 82-1299

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES D. BRYDLE AND JOANN BRYDLE,

Petitioners,

-vs-

STANLEY KALASUNAS AND GLORIA KALASUNAS

Respondents.

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I N D E X

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BRIEF IN OPPOSITION

Respondents submit this short brief in opposition to the Writ of Certiorari filed by Petitioners.

Apparently petitioners contend that the findings at the State level were so inclusive that it was impossible for the Bankruptcy Court, District Court, or U.S. Court of Appeals, Sixth Circuit to determine whether the subject fraud was either constructive fraud or actual fraud. Petitioners contend that they were entitled to a hearing in the Bankruptcy Court to determine the specific type of fraud involved in this case.

Respondents assert that the nature of the fraud is abundantly clear. Petitioners filed no affidavits opposing Respondents' Motion for Summary Judgment, choosing to defend only on the basis of written and oral arguments. Respondents' Motion for Summary Judgment was supported

by ten stipulations, including the three separate judgments of the trial judge; noticeably absent in Petitioners' brief and contrary to Supreme Court Rule 21(j) is any reference to the judgment of the trial judge dated October 21, 1980, which in part provides as follows:

> "...The court finds that from the testimony of the defendants Charles Brydle and Joann Brydle that the following facts occurred: That the property being sold was shown to the plaintiffs with the knowledge and consent of the Brydles who were selling the property. At the time the plaintiffs viewed the property, there existed electrical wiring in the garage and to the pond, full insulation in the attic, and an operable sink in the half bath located in the basement.
>
> Defendants Brydles admitted and the Court finds that after plaintiffs were shown the home, Charles Brydle in order to comply with the City of Euclid ordinance, removed all wiring from the garage, which of necessity also disconnected the pond and its fixtures; that he removed all insulation from the attic of the home;

and that he disconnected the drainpipe and removed the handles from the sink located in the half bath in the basement.

The Court further finds that after removing said items, the defendants Brydles at no time advised the plaintiff that said changes had been made in the home.

The Court further finds that at that point the defendants Brydles had a duty to inform the plaintiffs that conditions which previously existed in the home, to-wit: the existence of wiring, insulation, and sink, no longer existed and that the prior representation that they were included with the sale was no longer true, due to the actions of the Brydles in removing these items from the home.

The Court finds that said actions admitted by the defendants constitute proof by a preponderance of the evidence and by a clear and convincing standard, and that the plaintiffs were entitled to recission for fraudulent inducement...."

In short, Petitioners showed Respondents Petitioners' home for the purpose of sale; after a sale agreement

was executed and in order to comply with certain local housing ordinances governing transfer of property, Petitioners substantially altered and decreased the value of the real estate and took Respondents' purchase price without telling Respondents about the damage done to the property. Clearly, such blatant conduct can only be described as actual fraud.

Petitioners portray themselves as "ordinary citizens" being treated "unduly harsh" having been refused a "fresh start" as provided by the bankruptcy laws. The bankruptcy law was expressly written to deny discharge to someone who has committed acts of such a nature that in the interest of justice and fairness, a fresh start cannot reasonably be justified. Unequivocally, Petitioners' acts fall within this category.

C O N C L U S I O N

The magnitude of the question Petitioners present is of slight, if any, consequence, there being no constitutional or other substantial right involved; three courts have previously heard and rejected their plea. The obvious and sole purpose of this petition is harrassment and to further burden Respondents.

WHEREFORE, for the reasons set forth herein, a Writ of Certiorari should be denied.

Dated this 24th day of February, 1983.

Respectfully submitted,

Richard A. Oviatt
Attorney for Respondents